Supreme Court, U.S.
FILED

(1)

CASE NO. 95 • 542 SEP 27 1995

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

RICHARD EDWARD LEON, SR.

Petitioner,

versus

THE SUPREME COURT OF FLORIDA and
THE FLORIDA BOARD OF BAR EXAMINERS

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO
THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

DOES THE FOURTEENTH AMENDMENT PROHIBIT A STATE FROM REJECTING ON TENUOUS GROUNDS AN APPLICATION TO PRACTICE LAW FOR MORAL DISQUALIFICATION WHERE THE EVIDENCE SHOWS THE APPLICANT IS MORALLY QUALIFIED UNDER THE RULES OF ADMISSION.

PARTIES

The Petitioner is:

Richard Edward Leon, Sr.

The Respondents are:

The Supreme Court of Florida

The Florida Board of Bar Examiners

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In this Petition, the Florida Board of Bar Examiners will be referred to as the "Board" and the Applicant as "Petitioner."

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REFERENCE TO OFFICIAL REPORTS OF OPINIONS BELOW

There are no present official reports of the Findings of Fact and Conclusions of Law of The Florida Bard of Bar Examiners or of the orders of The Supreme Court of Florida denying review and denying rehearing as they are considered confidential. All of the above are on file in The Supreme Court of Florida under case style and number as follows:

IN THE SUPREME COURT OF FLORIDA

FLORIDA BOARD OF BAR EXAMINERS

RE: R.E.L. Case No. 84,786

JURISDICTION

The judgment for which review is sought was entered on May 12, 1995 (A 2). Petitioner filed a timely Motion for Rehearing (A 81) which was denied on 29 June 1995 (A 25).

The judgment for which review is sought is a final judgment of the highest court of the State of Florida where review could be sought and where the judgment turns upon substantial federal questions. Jurisdiction of the United States Supreme Court to review such cases is pursuant to 28 United States Code §1257.

There are no adequate state grounds for the denial of review of the Board's recommendation against admission to the practice of law in Florida as will be further addressed in the argument under the principles established in *Staub v. Baxley*, 355 U.S. 313 (1958). Petitioner's due process and equal protection rights were violated.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

FEDERAL CONSTITUTIONAL PROVISIONS

FOURTEENTH AMENDMENT

Section 1

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The following cited Rules are set out verbatim in the Appendix:

RULES OF THE SUPREME COURT OF FLORIDA RELATING TO ADMISSIONS TO THE BAR, Article III B.,

Section 2.a., 2.b., 2.c. (A 196-199);

Section 3.a., 3.b. (A 200-202), 3.d., 3.e., 3.f. (A 202-205);

Section 4.a., 4.b., and 4.e. (A 206-209).

STATEMENT OF THE CASE

The Petitioner was admitted to practice law in Florida in June of 1966 (A 5) and became a circuit judge in Hillsborough County, Florida (A 12). In 1983 Petitioner was charged with judicial misconduct by the Florida Judicial Qualifications Commission and, upon that body's recommendation, was removed from office by the Supreme Court of Florida (A 12).

Petitioner was indicted on July 13, 1983, on two counts of perjury, one count of official misconduct, one count of bribery, and one count of unlawful compensation (A 8). Petitioner was found guilty of the two perjury counts and the count on official misconduct (A 8, 13). The official misconduct count was reversed on appeal (A 8). Based upon the felony convictions and judicial misconduct he was disbarred from the practice of law by the Supreme Court of Florida on the 11th of June 1987 (A 5, 14). After the felony convictions Petitioner was placed on probation, fined $5,000.00, and ordered to perform one thousand hours of community service (A 8).

After completing his community service, Petitioner obtained a Doctorate in Medicine in the Dominican Republic (A 5) and in

1992 received a full Florida pardon for the convictions (A 193-195).

He applied for readmission to The Florida Bar and successfully completed the examination in November of 1992 (A 5-6).

The Board served specifications concerning Applicant's character and fitness including four "charges" as follows:

Specification 1

> That while serving as a Florida circuit court judge and as a member of The Florida Bar, you were investigated by the Judicial Qualifications Commission relative to your engaging in ex parte communications with Chief Circuit Court Judge Arden Mays Merckle in relation to the criminal case of Alisa D. Avery. That the Judicial Qualifications Commission filed a notice of Formal Charges in five counts against you on April 20, 1983. That a six count Amended Notice of Formal Charges was filed against you on May 13, 1983. That you were subsequently adjudicated guilty by the Commission on four of the counts the circumstances of which are clearly set forth in the Commission's Findings of Fact, Conclusions of Law and Recommendations attached here as Exhibit "A". The Supreme Court of Florida subsequently upheld the Commission's Findings and ordered your removal from judicial office.

Specification 2

> That you were indicted on July 13, 1983 by a Hillsborough County grand jury on two counts of perjury, one count of official misconduct, one count of bribery and one count of unlawful compensation. That a copy of the Indictment is

attached hereto as Exhibit "B." That you were subsequently tried by a jury and found guilty on December 14, 1993 on the perjury counts and one count of official misconduct. That the appellate court later set aside your conviction on the count of official misconduct and vacated the sentence as the underlying statute had been held unconstitutionally vague. That you were sentenced to serve five years probation, fined $5,000.00 in court costs and ordered to perform 1,000 hours of community service with HRS. That a copy of the Judgment and Probation Order is Exhibit "C."

Specification 3

That you were admitted to The Florida Bar in 1966. That by order of the Supreme Court of Florida issued on June 11, 1987, you were disbarred from the practice of law based upon your felony convictions and related removal from judicial office. That a copy of the Court's disbarment order is attached as Exhibit "D."

Specification 4

That you continue with a pattern of dishonesty as demonstrated by:

(A) You continue to deny the facts surrounding the alteration of Alisa D. Avery's criminal sentence which ultimately resulted in your conviction on two counts of perjury. Specifically, you relayed to the Board during the application process and during the investigative hearing that your observance of Ms. Avery being fingerprinted prompted your ex parte conversation with Judge Merckle.

That these statements to the Board are false or lacking in candor in that the JQC and the Grand Jury found your conversation with Ms. Avery's

father led to your conferring with Judge Merckle, rather than your viewing her in the fingerprinting process.

That said response that on the day of Alisa Avery's sentencing you saw her being fingerprinted from your office and that was the reason for your going to the office of Judge Merckle was false, misleading or lacking in candor. That you went to Judge Merckle's office, in truth and in fact, after conferring with Alisa Avery's father, Arthur Avery, Sr.

(B) That you appeared before the division of the Board on June 18, 1983 at which time you were questioned on matters material to the Board's investigation into your character and fitness for admission to The Florida Bar. That at said hearing you gave the following testimony under oath in response to the following questions:

Q. Are you guilty of perjury?

A. I did not commit perjury. I did not commit perjury. I have had a very, very law-abiding life. I've raised my family as a law-abiding citizen. I was guilty of lying to the investigator for the JQC. I admit that and that was a colossal mistake and I'm not guilty of perjury.

Q. Were you under oath when you testified before the JQC?

A. Yes, sir.

Q. I'm not an attorney. Would you describe to me, please, what is perjury?

A. Perjury is being under oath and giving a false statement.

Q. Well, you told us that you lied to the JQC--

A. Yes, sir.

Q. -- under oath.

A. No, sir.

Q. That's what you told us before, "I lied to the JQC."

A. Yes, sir, investigator, but that's not under oath, sir.

Q. Subsequently under oath you didn't lie to the JQC?

A. I was convicted of lying to the JQC. Your question was did I commit perjury and I did not commit perjury.

That said testimony that you did not commit perjury was false, misleading and lacking in candor in that you were convicted of perjury for having lied to the JQC.

(C) Additionally, that at said investigative hearing you testified that you recanted your false statements to the JQC's investigator before Judge Merckle did. That said testimony was false, misleading or lacking in condor because you did not recant until after discovering Judge Merckle was recanting.

(D) Further, that you told an investigator from the Florida Parole Commission and the Office of Executive Clemency on or about April, 1992 that you were pursuing medical licensure and not a career in law. That said statements were false, misleading or lacking in candor in that you

> are currently seeking admission to the bar in order to practice and have not pursued medical licensure since July, 1991.
>
> (A 7-11)

Specifications 1, 2, and 3 were basically admitted by the Applicant and Specification 4 was denied (A 256-260).

A formal hearing was held on the 15th day of July, 1994 before the Board (A 7). At the hearing, the Petitioner presented witnesses (A 84-192) and affidavits (A 210-255) attesting to his rehabilitation and present good moral character. The Board's only witness testified favorably to the Petitioner (A 183-192).

After the hearing, the Board issued its Findings of Fact and Conclusions of Law recommending that Petitioner not be admitted to The Florida Bar (A 4-21) after which Petitioner sought review before the Supreme Court of Florida (A 25-57) which was denied without opinion on May 12, 1995 (A 2).

Petitioner filed a motion for rehearing (A 78-83) which was denied on June 29, 1995 (A 23). This Petition followed.

Where and How the Federal Questions Were Raised

The due process and equal protection questions under the

Fourteenth Amendment were first raised in the Petitioner's motion for rehearing in the Supreme Court of Florida (A 78-82). This was done by case cite as follows:

> In *Baird v. Arizona*, 401 U.S. 1, 27 L.Ed 2d 639, 91 S.Ct. 702 (1971), the United States Supreme Court announced, as a general proposition, that:
>
> > The practice of law is not a matter of grace, but of right for one who is qualified by his learning and his moral character. See *Schware v Board of Bar Examiners, supra*, and *Ex parte Garland*, 4 Wall 333, 18 L.Ed 366 (1867). [A 78]

Then by attacking the procedures of the Board thusly:

> To merely hear and not apply proofs validly before it, resulted in a denial of due process by The Board. The United States Supreme Court in *Washington ex rel Oregon R. & N. Co. v. Fairchild*, 224 U.S. 510, 56 L.Ed. 863, 32 S.Ct. 535 (1912), set out the requirements of a fair tribunal. This case involved a ruling of a state railroad commission resulting from an asserted hearing held in violation of due process.
>
> The Court, in reversing, stated:
>
> > The carrier must have the right to secure and present evidence material to the issue under investigation. It must be given the opportunity by proof and argument to controvert the claim asserted against it <u>before a tribunal bound not only to listen, but to give legal effect to what has been established</u>.
>
> (Emphasis supplied.)

This principle was violated by The Board.

(A 80)

Finally, quoting from *Staub v. Baxley*, 355 U.S. 313 (1958) for the proposition that the judicially affirmed actions of the Board did not rest on tenable non-federal grounds:

> "It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support. . . [for] if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided."
>
> (Emphasis supplied.)
>
> The Board's reasoning and foundation for its conclusion is untenable.
>
> (A 81-82)

On that same page, Petitioner noted that the Board was punishing Petitioner for fully pardoned past misdeeds in violation of the Fourteenth Amendment (A 82) and that U.S. Representative Larry Smith was only suspended from the practice of law for three years for conduct similar to that of Petitioner (citing *The Florida Bar v. Smith*, 650 So.2d 980 (Fla. 1995)). (A 82-83).

ARGUMENT

DOES THE FOURTEENTH AMENDMENT PROHIBIT A STATE FROM REJECTING ON TENUOUS GROUNDS AN APPLICATION TO PRACTICE LAW FOR MORAL DISQUALIFICATION WHERE THE EVIDENCE SHOWS THE APPLICANT IS MORALLY QUALIFIED UNDER THE RULES OF ADMISSION.

In *Baird v. Arizona*, 401 U.S. 1 (1971), this Court announced, as a general proposition, that:

> The practice of law is not a matter of grace, but of right for one who is qualified by his learning and his moral character. See *Schware v Board of Bar Examiners, supra*, and *Ex parte Garland*, 4 Wall 333, 18 L.Ed 366 (1867).

It is apparent that The Board lapsed into a subjectively based reasoning process which ignored the clear and convincing evidence of rehabilitation and moral fitness which, under a proper constitutionally objective analysis, could only have resulted in a favorable recommendation.

The Board merely heard but did not apply proofs validly before it. This resulted in a denial of due process by The Board. The United States Supreme Court in *Washington ex rel Oregon R. & N. Co. v. Fairchild*, 224 U.S. 510 (1912), set out the require-

ments of a fair tribunal. That case involved a ruling of a state railroad commission which was asserted to have ignored the evidence before it.

This Court, in reversing, stated:

> The carrier must have the right to secure and present evidence material to the issue under investigation. It must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to listen, but to give legal effect to what has been established.
>
> (Emphasis supplied.)

This principle was violated by The Board.

The Board's only witness was Felix Ruiz, the Parole Examiner who investigated the Applicant in relation to his request for a pardon. He had investigated the Petitioner concerning his application for the pardon of his convictions (A 183-192). He did not uncover anything bad or derogatory (A 190).

At the formal hearing, Petitioner submitted numerous affidavits (A 210-255) all attesting to his moral character and fitness to practice law, including one from now deceased James C. Atkins, former Justice of the Supreme Court of Florida (A 254-255).

At the hearing, Petitioner presented numerous witnesses a cross-section of which are in the Appendix as follows:

1. Frank D. Alvarez, Circuit Judge and Chief Judge of the Thirteenth Judicial Circuit (A 84-107);

2. Bob Anderson Mitcham, Circuit Judge (A 108-126);

3. James A. Arnold, Circuit Judge (A 127-133)

4. Sam Pendino, Circuit Judge (A 134-145);

5. Carl Neill (A 146-156);

6. Fred L. Buckine (A 157-174);

7. Henry O. Wilson (A 175-182);

All attested to the Petitioner's good moral character.

The only evidence against the Petitioner was:

1. The convictions (A 8), now fully pardoned (A 193-195);

2. Disbarment from the practice of law (A 8); and

3. Removal from judicial office (A 7-8).

The Board, in finding Petitioner failed to establish rehabilitation (A 18), established a policy which resulted in an impossible burden on any applicant convicted of perjury to establish rehabilitation. The Board found the evidence on Specification 4 insufficient and found it not proven (A 14-15) but found Specification 1, 2, and

3 proven and that any one would be adequate reason to recommend against admission (A 13-14). Yet, the overwhelming evidence is that the Petitioner accepted his conviction without malice (A 84-175).

The Board alluded to Petitioner's lack of community service and positive actions indicating a useful and constructive place in society (A 17) and concluded that:

> Instead, the applicant has merely shown that he is now living as and doing those things he should have done throughout life, such as complying with the terms of his sentence, working and supporting his family.

Here the Board's bias surfaces; the Petitioner testified he voluntarily contributed free medical service to the poor over a four-year period (A 5-15, 263). The Board discredited this by stating:

> As to the applicant's medical assistance to the poor, no evidence exists, through independent testimony or documentation, that would verify this work was more than required of all medical students as a part of the medical curriculum.
>
> (Emphasis supplied.)
> (A 16)

Applicant's testimony was under oath, unrebutted, independent, and admissible even under strict evidentiary rules.

The Board also took issue with Petitioner's testimony

concerning his injuries which he asserted prevented him from doing more community service. The Board stated:

> Finally, the applicant did not present any evidence showing the type and extent of his injuries. . . .
>
> (Emphasis supplied.)
> (A 16)

Yet, the Petitioner, himself a medical doctor, stated:

> I had a serious automobile accident. I had back surgery. I had a disc removed. It's kind of hard to survive and do community service when you are hospitalized and disabled.
>
> (A 161-163)

The Board, of course, could have cross examined on the subject but elected not to do so.

The Rules of the Supreme Court of Florida relating to admission to the Bar, Article III, B, Section 3 f, provide in pertinent part:

> The Board is not bound by technical rules of evidence at a formal hearing.

Obviously, the Board did not abide by the rule in considering Applicant's unrebutted testimony and apparently rejected, without reason, that testimony. It is apparent that that rule of evidence was invoked discriminatorily and violated the principle set out in

Washington ex rel. Oregon R. & N. Co. v. Fairchild, supra.

It may be that the Board was frustrated when its position in Specification 4 became untenable because of the obvious First Amendment right of one convicted of an offense to continue to maintain his innocence.

This was compellingly brought home by the testimony of Frank D. Alvarez, Florida Circuit Judge (A 84-107), who recounted his experience as a prosecutor where he had obtained a death sentence in a murder case only to have, 15 years later, the primary witness recant resulting in a finding of innocence of the one convicted (A 96-97).

Obviously, had the defendant not maintained his innocence, he would have been executed!

The Rules of Admission state that any applicant that affirmatively asserts rehabilitation from prior conduct shall be required to produce clear and convincing evidence of rehabilitation (A 208).

The Rules also limit the <u>determination</u> by the Board of the <u>present</u> character and fitness of an applicant (A 199). It thus follows that no matter what an applicant's past he may, by making the requisite showing, be admitted to the practice of law in Florida.

The Board perverted the rules in a manner resulting in a realistically impossible burden. This is shown in the rejection of perfectly good unimpeached testimony.

In *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957), the Court cautioned on the use of good moral character as a factor upon which to reject an applicant. There it was said:

> A. *Good Moral Character*.--The term "good moral character" has long been used as a qualification for
>
> *[353 US 262]
>
> *membership in the Bar and has served a useful purpose in this respect. However, the term, by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law.

(Emphasis supplied.)

In dealing with the means of proving good moral character, the opinion in *Konigsberg* states:

> A person called upon to prove his character is compelled to turn to the people who know him.

(Emphasis supplied.)

It logically follows that the Board could prove bad moral character

the same way with its power of subpoena and authority to investigate. No showing was made by the Board in that regard.

Petitioner followed *Konigsberg* and presented clear and convincing evidence of his moral qualifications; the Board submitted nothing in rebuttal. Instead, the Board did what *Konigsberg* warned against by recommending Petitioner not be admitted under a flawed definition of good moral character.

The Board forgot, in its zeal to sustain its charges, that they are to ascertain present good moral character under the rule (A 199). With the morass of tools available (rehabilitation factors (A 199) and burden of proof (A 208)) the resulting definition of good moral character equates to anything desired to justify rejection.

Community service, for instance, while a desirable character factor, cannot constitutionally be a required element of good moral character since human situations are of such variety that this factor may be impossible for many.

Here the admonition of *Konigsberg* is realized in the Board's proceedings and conclusion.

Applicants to practice law are proceeding through the system in great numbers, not only in Florida but throughout the nation.

The problem exemplified by this case is deserving of this Honorable Court's consideration.

CONCLUSION

The Court is requested to issue its most high writ of certiorari requiring the Supreme Court of Florida to forthwith transmit the record by it held in this case to this Honorable Court for a full briefing and consideration.

Respectfully submitted,

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